IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO.2608 OF 1991

Mohamad Farooq Shaikh, aged 47,
1976, Block No.2, Gaffair Baig Street,
Pune-411 001. .. Petitioner.
(Orig.deft-tenant)

Vs

Miss Margaret D'Souza, since deceased
through her L.Rs.:
1a. Miss Agness Clara D'Souza,Adult,
residing at 1975 Gaffar Street,
Camp, Pune 411001.
1b Mr.Noel D'Souza, aged Adult,
residing at 31, POWI S GARDENS
London NWII 8 HW (UK) .. Respondent
(Orig.Plff-landlady)

Mr K.Y.Mandlik, for the petitioner.
Mr N.V.Vechalekar, for the respondent, (absent).

CORAM : D.B.BHOSALE,J.

DATE : 04.10.2005.

ORAL JUDGMENT:

1. Heard Mr Mandlik, learned counsel for the petitioner. None appears for the respondent.

2. This is the tenant's petition against the judgment and order dated 7.3.1991 rendered by the learned Vth Addl.District Judge, Pune in Civil Appeal No.12 of 1988 allowing the appeal filed by the respondent-landlady by setting aside the judgment and decree passed by the trial Court on 29.5.1987 in Civil Suit No.301 of 1985 and decreeing her suit for eviction under section 13(1)(l) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, "Bombay Rent Act").

3. The suit was filed by the respondent against the petitioner-tenant to recover possession of the suit premises on the grounds under section 13(1)(g) and 13(1)(l) of the Bombay Rent Act. The trial Court vide its judgment dated 29.9.1987 dismissed the suit on both the grounds. In appeal, the Appeal Court confirmed the findings of the trial Court on the ground of bonafide

requirement under section 13(1)(g) of the Bombay Rent Act, and decreed the suit holding that the petitioner-tenant had acquired vacant possession of a suitable accommodation for his residence. The suit premises consists of block no.2 admeasuring 1200 sq.ft situate at ground floor of house no.1976, Gaffar Baig Street, Pune. Admittedly, the suit premises has been in possession of the petitioner as a tenant since 1.11.1979, i.e. after the death of his mother. However, it appears that the father of the petitioner was inducted as tenant in the suit premises in or about 1941. His father died in June, 1956 leaving behind the petitioner and his mother. The petitioner's mother was thereafter accepted as tenant. After the death of the petitioner's mother, in November 1979 he was accepted as a tenant of the suit premises. According to the petitioner he was borne in the suit premises.

4. The suit has been decreed only on the ground under section 13(1)(l) of the Bombay Rent Act. The landlady has not challenged the concurrent findings of the court below rejecting her claim of possession on the ground of bonafide requirement.

5. Possession was sought on the ground that the

petitioner-tenant has acquired two suitable accommodations for his residence. The first being the property no.775, Tabut Street, Pune and second being property no.44, Sasoon Road, Kazi Building, Pune. The first accommodation is petitioner's ancestral house (for short "the ancestral house") whereas second accommodation (for short "Kazi building") was acquired by the petitioner in 1965. Kazi building flat is in possession of one K.K.Nag and Company as tenants since beginning. In view thereof the Appeal Court has observed that it was not vacant and as such acquisition of the said property cannot be said to be a suitable accommodation for the petitioner-tenant. This finding is not assailed by the respondent. However, in respect of the two rooms in ancestral house the appeal court has held that it was ancestral property of the petitioner's family and in partition he got possession of the said two rooms, one on the ground floor and other on the first floor and they are sufficient to accommodate the defendant's family of eight members and has accordingly decreed the suit under section 13(1)(l) of the Bombay Rent Act. It is very pertinent to note that nowhere in the judgment the Appeal Court has recorded a finding that at the time case for eviction is set up by the respondent in the pleadings under section 13(1)(l) the

said two rooms were vacant and available for occupation, nor it is considered as to when the partition of the ancestral house was effected and when the petitioner got possession of the said two rooms.

6. I have perused the pleadings and the evidence of the landlady and also of the tenant. The tenant has categorically stated in his evidence that no part of the ancestral property is vacant. He has further stated that he got two rooms in partition; one on the ground floor and other is an attic like room on the first floor. There was no cross-examination of the petitioner-tenant on the point as to when the partition was effected and whether the said premises was vacant and available for occupation when the suit was instituted. It is now well settled that before the landlord can be granted decree for eviction on the ground aforestated, the landlord is required to plead and prove that after coming into operation of the Bombay Rent Act the tenant has built a suitable residence or acquired vacant possession of the suitable residence or has been allotted suitable residence. In other words, at the time action is initiated by the landlord for eviction of tenant under section 13(1)(l) by way of original plaint or amendment, the tenant must have built

suitable residence or acquired vacant possession of the suitable residence or the tenant has been allotted suitable residence. The cause of action to the landlord to sue the tenant for eviction under section 13(1)(l) of the Bombay Rent Act arises upon building of a suitable residence by the tenant or acquisition of vacant possession of suitable residence by the tenant or allotment of suitable residence to the tenant and that must precede when pleading under section 13(1)(l) is made. If at the time the case for eviction is set up by the landlord in the pleading under section 13(1)(l), the tenant has not built suitable residence nor acquired vacant possession of suitable residence nor has been allotted suitable residence, the suit must fail irrespective of the fact that during the pendency of suit the tenant acquired vacant possession of suitable residence or built suitable residence or allotted suitable residence. The expression "has built, acquired vacant possession of or been allotted suitable residence" occurring in section 13(1)(l) of the Bombay Rent Act clearly indicates that either of this must happen before such case is set up in pleading and such pleading is accordingly proved in evidence. This is settled in **Shankarrao Dattatraya Kalyankar Vs Vishwasrao Dadasaheb Patil, 1998 (3) Mh.L.J. 722**. The landlady,

in the present case, has not stated in the pleadings that the two rooms of the ancestral house were allotted to the share of the petitioner in the partition prior to filing of the suit and they were vacant and available to acquire for his suitable residence. The burden was on the landlady to set up such a case in the pleadings under section 13(1)(l) of the Bombay Rent Act and he ought to have proved in evidence that the said property was vacant and available for the residence of the petitioner. The Appellate Court has completely overlooked the settled position of law. In the circumstances, the writ petition deserves to be allowed and is allowed accordingly. The impugned judgment and order dated 7.3.1991 is set aside. The judgment and order dated 29.9.1987 is confirmed. Rule is, accordingly, made absolute. No costs.

(D.B.BHOSALE, J.)

HIGH COURT
CIVILI APPELLATE SIDE

WRIT PETITION NO.2608 OF 1991

Date of Judgment:

4/10/2005

For approval and signature

THE HON'BLE MR.JUSTICE D.B.BHOSALE.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur Aurangabad or Goa offices?